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IN THE

Supreme Court of The United States

October Term, 1964

No. 490

JOSEPH E. MOSES and wife, JOSEPHINE E. MOSES,
Petitioners

vs.

NORTH CAROLINA STATE HIGHWAY COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above entitled case on February 26, 1964. A petition to rehear was examined and denied on the 11th day of June, 1964, by The Honorable R. Hunt Parker, Associate Justice of the North Carolina Supreme Court and The Honorable Carlisle W. Higgins, Associate Justice of the North Carolina Supreme Court.

CITATIONS TO OPINIONS BELOW

The judgment of the trial court (R. 14-19), is printed in Appendix A hereto, **infra**, p. 12. The opinion of the Supreme court of North Carolina, printed in Appendix A hereto, **infra**, p. 16, is reported in 261 N. C. 316. Notification by the Clerk of the North Carolina Supreme Court that the petition to rehear was denied, is printed in Appendix A hereto, **infra**, p. 24.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on February 26, 1964. p. 16, infra. A timely petition for rehearing was denied on June 11, 1964. p. 24. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

How Federal Question Is Presented. This action was originally commenced in the Superior Court of Cumberland County, North Carolina, by the petitioners seeking to recover compensation from the respondent, for the taking and appropriation of certain property and property rights of the petitioners. The right of the petitioners to recover just compensation for the taking and appropriation of their property and property rights by the respondent under the Constitution of the United States was presented to the trial court in the brief submitted to the Court by the petitioners and in the oral arguments of counsel for the petitioners. The trial court noted the constitutional rights in the course of the arguments and adjudged that the respondent had taken and appropriated to its own use certain property rights which were compensable within the meaning of the law. In the judgment entered, the Court did not note any specific provision of the law upon which its judgment was based.

The right of the petitioners under the United States Constitution, for just compensation for the taking of their private property for public use, was again drawn into question in the brief of the petitioners filed with the Supreme Court of North Carolina. There again the petitioners asserted:

> "The Constitution of the United States, in a little known clause of the noted Fifth Amendments, provides: 'nor shall private property be taken for public use without just compensation.' "

It should be noted, however, at this point, that the petitioners' brief contained a mistaken reference to the Fifth Amend-

ment to the United States Constitution, in lieu of a proper reference to the Fourteenth Amendment. Notwithstanding this error, the petitioners submit that they timely raised and preserved their contention that their property and property rights could not be taken by the respondent without just compensation, under the Constitution of the United States. BRANIFF AIRWAYS vs NEBRASKA STATE BOARD, 347 US 590.

QUESTION PRESENTED

Whether a property owner is deprived of property, without due process of law, if the highway to which he proviously had immediate and unlimited access is rebuilt on the existing right-of-way in a manner which denies him reasonable convenient and suitable access to the main thoroughfare in at least one direction, notwithstanding the availability of a frontage road from which his abutting property has circuitous access to the main thoroughfare at remote interchanges.

STATEMENT

This action was instituted in the Superior Court of Cumberland County, North Carolina, by the petitioners, Joseph E. Moses and his wife, Josephine E. Moses, against the respondent, North Carolina State Highway Commission, to recover damakes for the taking and appropriation by the respondent of certain property rights of the petitioners, namely, the right of immediate access to and from the main traveled lanes of the highway running directly in front of their property. (R. 4). The respondent denied by their answer, that any property or property rights of the petitioners had been taken. The cause came on to be heard in the Superior Court of Cumberland County, North Carolina, and a judgment was rendered in favor of the petitioners adjudging that the respondent had taken and appropriated to its own use certain property rights of the petitioners in those lands described in the petition and that the interest of the petitioners was a compensable interest within the meaning of the law.

The respondent appealed to the Supreme Court of North Carolina and a judgment was entered by that Court on the 26th day of February, 1964. (Appendix A, **Infra**, p. 16). A timely petition for rehearing was filed and was denied on the 11th day of June, 1964.

The property of the petitioners Moses is located on U. S. Highway 301 approximately five miles south of the prosperous and thriving city of Fayetteville in Cumberland County, North Carolina. Prior to its conversion to a controlled-access highway the Moses' property, and that over which it had an easement of record, abutted U. S. Highway 301, a conventional two-lane highway on a 100 foot right-of-way. Traffic moved in both directions on a hard surface approximately twenty feet in width, adjacent to which were gravel and dirt shoulders. The Moses' property was on the east side of the highway and had direct and immediate access to the traveled portion of the highway over two connecting roadways. The real estate in question had a frontage of 550 feet and an average depth of 300 feet. It was used for a motel and restaurant, the motel having been built in 1954 and the restaurant in 1957. Thereafter, the state designated the thoroughfare a controlled-access highway, and in July 1962 opened the road as Interstate I-95, and placed a wire fence between the property of the petitioners Moses and the main traveled portion of the highway, thereby removing all direct and immediate access of the traveling public to and from the Moses' property.

The main traveled portion of the highway is now divided into two one-way surfaces, each 24 feet in width and separated by a wide median strip. To the east is a strip approximately 70 feet wide separating the northbound lane from a new service or frontage road which is 18 feet in width. The petitioners Moses have access to the service road over the same driveways they previously used.

A wire fence has been constructed between the service roads and the main traveled portion so that a motorist en-

tering the service road must travel circuitous routes to remote interchanges in order to enter the main thoroughfares. A motorist traveling on the main thoroughfares must locate and drive circuitous routes to remote interchanges in order to reach the motel and restaurant of the Moses.

A motorist traveling south on the main traveled portion must, in order to reach the motel and restaurant of the Moses, travel further south approximately one-half mile, leave the Interstate highway, turn his car around and cross over all lanes of the highway by way of an overpass and then enter on the north bound lane and drive north past the property of the petitoners for about three-tenths of a mile to an interchange, then leave the main traveled portion and turn south on the service road and drive about three-tenths of a mile to the Moses' property. In all, a south bound motorist must travel 1.65 miles further than before and change his direction of travel at least three times. A motorist traveling in the north bound lane of the main traveled portion of the highway must drive past the property of the petitioners for about three-tenths of a mile, traverse an intricate interchange and then drive back south on the service road for three-tenths of a mile—an increase in distance of .65 miles.

The petitioners contend that their property has suffered compensable damage by being denied access to the main thoroughfare except at remote interchanges even though the property has unlimited access to a service road over which the main thoroughfare may be reached by a circuitous route, and that the taking of such access without just compensation is a taking by the State without due process of law as required by the Fourteenth Amendment to the U. S. Constitution.

REASONS FOR GRANTING THE WRIT

There has been much publicity and great national pride engendered over the "National System of Interstate and Defense Highways." The happy thought of rolling along at 70

miles an hour over a four to six lane divided highway from coast to coast and border to border, 43,000 miles, has a romantic appeal to the motorist, the scenery lovers and much more practically, to the interstate truck lines. There is, however, another side to the coin.

In the glamour that surrounds the Interstate System too little attention has been paid to the thousands of farmers, neighborhoods and homes of the people whose pattern of life is permanently altered by this gigantic system of roads, nor to the local economic impact.

Yet, the use of land is restricted; old businesses are destroyed; new businesses are created; some towns are doomed to die; others to be created; some land to become extremely valuable; others to decline—all dependent upon its proximity or access to or distance from the limited access points on this highway system. The economic impact on industry and commerce and all other elements of the nation's economy are bound to be spectacular.

The construction of this new highway system has also had its effect upon the law. The access-free highways has revived the somewhat dormant "property right of access" enjoyed by abutting land owners and made it a major consideration in land acquisitions for the system.

The construction of the access-free interstate roads has created at least one new and unique problem in the field of property law—the frontage or service road question. That problem is presented by this petition and will be raised by many other cases in America as the program progresses. Those courts which have ruled on this question are in hopeless conflict and a decision of this Court would have wide import under the Constitution of the United States and its importance would be far beyond the particular facts and parties involved.

The basic problem posed by the facts in this case may be restated in this manner: Has the abutter who is placed on

the service road suffered an injury to his right of access compensable in eminent domain by being relegated to the service road rather than adjoining the express lane? In short, must the abutter be awarded just compensation under the Fourteenth Amendment to the United States Constitution for being placed on a service road?

> Clarence A. Davis and Burkett Van Kirk, **Some Rights of Landowners Adjacent to the Interstate Highway System,** 11 NEBRASKA STATE BAR JOURNAL 5.
>
> Convey, **Frontage Roads: To Compensate or not to Compensate,** 56 NORTHWESTERN UNIVERSITY LAW REVIEW 587.

The Due Process clause of the Fourteenth Amendment to the United States Constitution reads as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Prior to the adoption of the Fourteenth Amendment the power of eminent domain, which is deemed to inhere in every State and to be essential to the performance of its functions, was unrestrained by any federal authority. GREEN V. FRAZIER, 253 U. S. 233, 238. An express prohibition against the taking of private property for public use without just compensation was contained in the Fifth Amendment; but an effort to extend the application thereof to the States had been defeated as early as 1833. BARRON V. BALTIMORE, 7 Pet 243. The most nearly comparable provision included in the Fourteenth Amendment, was the prohibition against a State depriving a person of property without due process of law. The Court later held that this restraint on State action, minus the explicit provision for just compensation

found in the Fifth Amendment, afforded property owners the same measure of protection as did the latter in its operation as a limitation on the Federal Government. CHICAGO, B. & Q. R. CO. V. CHICAGO, 166 U. S. 226, 233, 236-237.

The question thus presented in this petition is whether the taking of the access of the petitioners Moses to the main traveled portion of the highway was a taking so as to bring the case within the protection of this constitutional provision. The Court below, in its opinion, held that it was not and that such taking was merely an exercise of the police power of the State. Appendix A. p. 16. The petitioners submit that it was.

It is conceded that the weight of authority holds that a property owner has no vested interest in the continued flow of the main stream of through traffic, and the State may divert it to a new location without being liable for consequential economic losses which owners abutting on the old highway may sustain. It is not conceded, that where, as in the instant case, the property is located on a long established highway near a prosperous and thriving city, and where its accessibility from the highway and close proximity to the City of Fayetteville attracted the patronage of the traveling public, thereby enticing the petitioners to invest their life's earnings, that the State should be allowed to dismiss any claim for damages by waving the magic wand of "police power." It is submitted that such conditions gave the property a special status which entitled the owners to damages, notwithstanding the circuitous access afforded by the service road.

The State Courts which have dealt with the subject have come to widely differing conclusions and have demonstrated a remarkable lack of unanimity within the courts themselves. Of the recent decisions which have considered the question, those of Arkansas, New Mexico, New York, South Dakota, Texas and Wisconsin have denied relief. Those opinions adopt the view that an abutting owner has no vested interest in the flow of public travel, and that controlling access is

merely the exercise of a State's inherent police power which, if reasonably asserted, gives rise to no cause of action for damages by reason of the diversion of traffic or circuity of route which may result. Actual damages are treated as "damnum absque injuria."

ARKANSAS STATE HIGHWAY COMMISSION v. BINGHAM, 231 Ark 934, 333 S.W.2d 728

STATE HIGHWAY COMMISSION v. DANFELSER, 72 N. M. 361, 384 Pac. 2d 241.

SELIG v. STATE, 10 N.Y.2nd 34, 217 N.Y.Supp 2d 33, 176 N.E.2d 59.

DARNALL v. STATE, S. D., 108 N. W. 2d 201.

HOBROOK v. STATE, Texas, 355 S. W. 2d 235.

DECK v. STATE HIGHWAY COMMISSION, 13 Wis. 2d 511, 109 N.W.2d 71, 111 N.W.2d 95.

STEFAN AUTO BODY v. STATE HIGHWAY COMMISSION, 21 Wis. 2d 363, 124 N.W.2d 319.

Jurisdictions whch have permitted recovery are Alabama, Arizona, California, Florida, Georgia, Mississippi, Washington, and Minnesota. These courts acknowledge the State's right to regulate traffic without liability for the resulting damage, and have no quarrel with the principle that compensation need not be paid for the relocation of a highway diverting the main flow of traffic. However, the hold that where an existing highway is converted into a limited access thoroughfare, abutting owners have lost a valuable right which is not necessarily restored by furnishing a frontage or service road.

HENDERICKSON ET AL v. STATE OF MINNESOTA ET AL, 127 N. W. 2d. 165.

BLOUNT COUNTY v. McPHERSON, 268 Ala. 133, 105 So 2d 117.

STATE v. THELBERG, 87 Ariz. 318,325, 350 Pac. 2d. 988,992.

PEOPLE v. RICCIARDI, 23 Cal. App. 2d. 264, 299 Pac. 2d. 519.

BLUMINSTIEN v. CITY OF LONG BEACH, 143 Cal. App. 2d. 264, 299 Pac. 2d. 347.

PEOPLE v. AYON, 54 Cal. 2d. 217, 5 Cal. Rep. 151, 352 Pac. 2d. 519.

ANHOCO CORPORATION v. DADE COUNTY, FLORIDA, 144 So. 2d. 797.

CLAYTON COUNTY v. BILLUPS EASTERN PETROLEUM CO., 104 Ga. App. 778, 123 S. E. 2d. 187.

HAMILTON v. MISSISSIPPI STATE HIGHWAY COMMISSION, 240 Miss. 314, 114 So. 2d. 673.

MISSISSIPPI STATE HIGHWAY COMMISSION v. FNCH, 237 Miss. 314, 114 So. 2d. 673.

McMORAN v. STATE, 55 Wash. 2d. 37, 345 Pac. 2d. 598.

The decisions of the highest courts of several states are irreconcilable on this very important question concerning the property rights of literally thousands of our citizens. It has been estimated that one-fourth of the entire interstate highway system will be constructed over existing roads. This will mean, of course, that the property rights of those persons on the existing highways will be essentially in the same dilemma as the petitioners. To illustrate the irreconcilable positions that the various states find themselves in a questionnaire was circulated among the highway commissioners of the fifty states and the District of Columbia, during the fall of 1961. Responses were received from all of the highway commissioners except those of Michigan and West Virginia. (Six additional states were excluded from the statistics for other reasons.) The results of the survey shows that 22 states, or fifty percent of those responding indicated that in

their day-to-day operations they did compensate a land owner who formerly abutted the express lane for placing him on a service road. On the other hand 21 states or forty-nine percent of those responding indicated that in their day-to-day operations they did not compensate a land owner who formerly abutted an express lane for placing him on a service road.

Convey, **Frontage Roads: To Compensate or not to Compensate,** 56 NORTHWESTERN UNIVERSITY LAW REVIEW 587.

CONCLUSIONS

The petitioners Moses have placed their life's earnings in the construction of a motel and restaurant. In selecting their site they chose a busy U. S. highway that had been long and well established. A very few years after they commenced their operations they find to their consternation that the existing highway was being converted to a limited access highway and that immediate access to their business was being cut off by law as well as by a wire fence. The access granted to them by the service road is more than a mere inconvenience or circuitous route. It is submitted that in this day of modern travel that the traveling public is not willing to leave a main thoroughfare, turn their car around, cross an overpass, then drive back by the business and negotiate an intricate interchange in order to patronize the business of the petitioners. Experience has shown this to be true.

It is respectfully submitted that the instant case presents a question of taking private property by the State without due process of law.

Respectfully submitted,

ROBERT B. MORGAN

Counsel for Petitioners

September 10, 1964.

APPENDIX A

JOSEPH E. MOSES and wife, JOSEPHINE E. MOSES
Petitioners

v.

NORTH CAROLINA STATE HIGHWAY COMMISSION.
Respondent

JUDGMENT

This cause came on to be heard before the undersigned presiding Judge at the September Term 1963 of the Cumberland County Superior Court. The petitioners were present in court and represented by their attorneys, Robert B. Morgan and A. R. Taylor, of Lillington. The respondent was represented in court by its attorneys, Andrew McDaniel of Raleigh, and George Quillin, of the law firm of Quillin, Russ & Worth, of Fayetteville.

From the pleading filed in this cause, the stipulations entered into by the petitioners and the respondent, and argument of counsel, the court finds the following facts:

1. That the petitioners, Joseph E. Moses and wife, Josephine Moses, are now and were on the 18th day of June 1962, the owners of the following tracts of land, which said lands are described in Paragraph III of the petition, to-wit:

a. That certain tract of land containing 1.70 acres, described in that deed, dated June 15, 1954, in Book 630 on page 435 in the office of the Register of Deeds of Cumberland County, which said tract is described on the map introduced into evidence by stipulation and marked Exhibit 1, as Tract 1.

b. That certain tract of land containing 2.0 acres described in that deed dated December 6, 1954 and recorded in Book 554, page 86, in the office of the Register of Deeds of Cumberland County, which said tract is described on the map introduced into evidence and marked Exhibit 1 and Tract 2.

c. That the ownership of both tracts of land is subject to such liens and taxes as the public records of Cumberland County may disclose.

2. That in Book 716, at page 128, in the Office of the Register of Deeds of Cumberland County, there is recorded an instrument entitled "Deed of Temporary Easement" dated July 10, 1957, and executed by D. A. Calhoun and wife, Agnes V. Calhoun, of Cumberland County, in favor of the petitioners herein, Joseph E. Moses and wife, Josephine Moses, of Cumberland County, and that the said instrument was filed for recordation on the 11th day of July 1957, and that the instrument was duly executed and recorded. Further, that at the time D. A. Calhoun and wife, Agnes V. Calhoun, executed the said instrument they were the owners of the land described in the instrument and had the right to grant such easement.

3. That on the 28th day of August 1959, the respondent entered into an agreement with D. A. Calhoun and wife, where the Highway Commission acquired all rights, title and interest of D. A. Calhoun and wife in the property described in the easement, as shown by that agreement recorded in Book 795, at page 370, in the Office of the Register of Deeds of Cumberland County, said lands being a strip of land lying between the 3.7 acres (composed of the two tracts, one containing 1.70 acres and one 2.0 acres) of the petitioners and of Eastern right of way of U. S. Highway 301 prior to the relocation and construction of said highway and the redesignating of it as Interstate Highway 95.

4. That since relocating and widening of U. S. Highway 301 into a multi-lane highway, designated as Interstate Highway 95 by and in the vicinity of the property owned by the petitioners and the property described in the easement, the said highway has been and is a controlled access highway with no direct access from the 3.7 acres of land to and from the main channels of traffic and that the respondents have constructed and erected a fence along the controlled access line since relocation as shown on the map introduced in the evidence and marked Exhibit 1, which said line runs between

the 3.7 acres of land of the petitioners and the main arteries of traffic of Interstate 95, said line being identified on Exhibit 1 as the C-A line.

5. That the main channels for traffic on said highway lie on the West side of the controlled access line erected by the respondent and that on the East side of said controlled access line and in front of the property owned by the petitioners, the respondent has caused to be constructed as part of this project, a road designated as a service road, containing two traffic lanes, and that the said service road is constructed within the right of way of the respondent and adjacent to the property owned by the petitioners.

6. That in order for traffic travelling from the property owned by the petitioners to travel to the main traffic lanes of Interstate 95, which was formerly U. S. Highway 301, it is necessary for traffic to enter into the road designated as a service road and travel either North or South to the nearest interchange as shown on the map introduced in evidence and marked Exhibit No. 1.

7. That the project by which U. S. Highway 301 was reconstructed and redesignated into U. S. Interstate Highway 95 was completed in July 1962.

8. That in order for a motorist travelling in the South lane of the Interstate Highway 95 to reach the motel or restaurant located on the property of the petitioners, it is necessary for the said motorist to travel South to the first interchange and to return across the bridge, re-enter Interstate Highway 95 on the Northbound traffic lane and travel to the first interchange just North of the petitioner's property and then back down the service road, which said distance is 1.65 miles. That this route is not shown on the map introduced in the evidence and marked as Exhibit 1.

9. That in order for a motorist travelling in the Northbound lane of Interstate Highway 95 to enter the motel or

restaurant on the property of the petitioners, after having reached a point directly in front of said property, it is necessary for the motorist to travel North to the first interchange and to turn onto the service road and travel South to the property of the petitioners, and that the distance of such travel as shown on the map marked Exhibit 1 is approximately .65 miles.

10. That prior to the taking of the lands described in the easement, which said lands lie between the 3.7 acres of land owned by the petitioners and the Eastern right-of-way of U. S. Highway 301, prior to the relocation and construction of said highway and its redesignation as Interstate Highway 95, the petitoners had direct access to and from the main travelled lanes of the said highway from their property.

11. That the respondent State Highway Commission has taken and appropriated to its own use all the right, title and interest, of the petitioners, in the lands described in the easement hereinabove referred to, and that the said interest of the petitioners was a compensable interest within the meaning of the law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the taking of the lands described in the petition, hereinabove referred to, by the respondent of the rights, title and interest of the petitioners, which said interest was a compensable interest.

2. The Clerk of the Superior Court is directed to appoint three competent, disinterested freeholders residing in Cumberland County to go upon the property and under oath appraise its damages to the property sustained by reason of the taking and appropriation by the respondent of the rights and interest of the petitioners and report the same to the Court as provided by Article 9, Chapter 136 of the General Statutes of North Carolina.

Entered at Fayetteville, North Carolina, on the 20th day of September 1963.

(s) E. MAURICE BRASWELL
Judge Presiding

To the tendering and signing of this judgment, the respondent, in apt time, takes appeal.

(s) E. MAURICE BRASWELL
Judge Presiding

JOSEPH E. MOSES AND WIFE, JOSEPHINE MOSES v. STATE HIGHWAY COMMISSION

(Filed 26 February 1964.)

Appeal by respondent from Braswell, J., September 9, 1963, Civil Session of Cumberland. This appeal was docketed in the Supreme Court as Case No. 605 and argued at the Fall Term 1963.

This is a condemnation proceeding. Petitioners seek damages because they have been denied immediate access from their property to Interstate Highway I-95, a controlled access road. Petitioners have access to the Interstate Highway by a service road connecting points fixed for entrance and departure from the Interstate Highway. This service road abuts the property of petitioners.

The court, based on stipulations of the parties and admissions in the pleadings, concluded petitioners were entitled to compensation. He remanded the proceedings to the clerk for the appointment of commissioners. Respondent appealed.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney McDaniel, Quillan, Russ & Worth for respondent appellants.

Charles R. Williams, Robert B. Morgan, Morgan & Williams, A. R. Taylor for appellee.

Rodman, J. An order directing the appointment of commissioners in a condemnation proceeding is interlocutory. It is not a determination of the rights of the parties as permits a dissatisfied party to appeal, G.S. 1-277, Board of Education v. Allen, 243 N.C. 520, 91 S.E. 2d 180; Veazey v. Durham, 231 N.C. 357, 57 S.E. 2d 375. Nonetheless when, as here, the parties desire an answer to a question which is fundamental in determining their rights, is also of public importance, and when decided will aid State agencies in the performance of their duties, we will in the exercise of the supervisory jurisdiction given us, answer the question, G.S. 1-278; Green v. Laboratories, Inc., 254 N.C. 680, 120 S.E. 2d 82; Edwards v. Raleigh, 240 N.C. 137, 81 S.E. 2d 273.

The question now for decision arises on this factual situation: Prior to 1954, U. S. 301 was a North-South link in the primary system of federal highways. It was one hundred feet in width, with a paved area in the center for vehicular traffic. This paved area provided one lane for north-bound traffic and another for south-bound.

The Highway Commission, in order to convert 301 into an Interstate Highway, proposed to enlarge its right-of-way. It had, prior to 15 June 1954, surveyed and marked the proposed boundary of the enlarged highway.

On 15 June 1954, Joseph Moses purchased from D. A. Calhoun 1.7 acres. This tract is situate east of 301. Its western boundary is the line respondent had marked for the boundary of 301 when enlarged. In December, 1954, petitioners purchased an additional 2 acres from Calhoun. The description in the deed then made covers 3.7 acres. It includes the 1.7 acres purchased in June, 1954. Petitioners purchased the 3.7 acres for the erection and operation of a motel and restaurant. The western boundary of the 3.7 acres is more than 100 feet east of the eastern line of 301 as it existed in 1954. The 3.7 acres is part of a larger tract owned by Calhoun. The western

line of his property was the eastern line of 301. On 10 July 1957, Calhoun granted petitioners an easement to cross his land lying between the 3.7 acres and the highway.

In August, 1959, respondent purchased from Calhoun the land lying between petitioners' 3.7 acres and the boundary of 301 as it existed in 1954. This purchase was made to enlarge 301 and make it a "controlled access," Interstate Highway, with four lanes for through traffic. These lanes are near the center of the right-of-way. Beyond the through traffic lanes are "service roads." These service roads are separated from the inner lanes by a fence. Abutting property owners gain access to the inner lanes by use of the service roads. Interstate, controlled access highways are constructed under congressional and legislative authorization. Federal Aid Highway Act of 1956, (70 Stat. 374); 23 U.S.C.A. 111, c. 993, S.L. 1957, codified as G.S. 136-89-48 et seq.

A motorist traveling south on the inner lane must, in order to reach petitioners' motel and restaurant, travel 1.65 miles further than he would if allowed direct access to their property. A motorist traveling in the north-bound lane to get to petitioners' property must travel .65 miles further than he would if given direct access.

If the denial of immediate access to the inner traffic lane is a taking of property compensation must be paid. N.C. Constitution, Art. I, Sec. 17; Williams v. Highway Commission, 252 N.C. 141, 113 S.E. 2d 263; Braswell v. Highway Commission, 250 N.C. 508, 108 S.E. 2d S.E. 2d 912; but if the substitution of a service road for the direct access theretofore enjoyed is an exercise of the police power, any diminution in the value of petitioners' property is damnum absque injuria. State v. Warren, 252 N. C. 690, 114 S.E. 2d 660; Morris v. Holshouser, 220 N.C. 293, 17 S. E. 2d 115, Roach v. Durham, 204 N.C. 587, 169 S. E. 149.

Abutting property owners having a private access to a highway cannot be denied the right to enter and use a road constructed for public benefit.

Petitioners do not claim a denial of access; they merely assert access to a portion of the highway is less convenient now than in 1957 when they acquired a right-of-way across land subsequently acquired by respondent. In fixing the line marking the boundary between public and private rights, we are reminded of what Seawell, J., said in Mosteller v. R. R., 220 N.C. 275, 17 S.E. 2d 133:

> "Ancient doctrines pertaining to roads of the horse and buggy days, when those roads were for the most part trails through the woods and fields, must be applied to modern conditions with caution and sound discrimination. Once, 'ingress and egress' were practically all such a road afforded, and there is logic in the thought that it is all of such a doctrine which should survive. Today roads have been multiplied and expanded into such luxurious proportions that the expression, 'once a road, always a road'—if we attach to it the significance given it by plaintiffs—will give to the abutting owner in a vacated road, if he takes all of it, an easement wholly beyond his necessities and not within the reasonable application of the doctrine.
>
> "The trend of judicial decision where this doctrine is recognized is decidedly toward confirming such a right to the necessity of egress and ingress."

Our statutes, G.S. 20-156 (a), (requiring one entering a highway from a private way to yield the right of way) and G. S. 20-165.1, (authorizing the establishment of one way streets and roads) illustrate the power of the State to regulate the time and manner of enterng a public highway. Although the State may change the grade of a road making immediate access more difficult, such a change and the resulting inconveniences caused the property owner is not a compensable injury. Smith v. Highway Commission, 257 N.C. 410, 126 S.E. 2d 87; Thompson v. R. R., 248 N.C. 577, 104 S.E. 2d 181; Calhoun v. Highway Commission, 208 N.C. 424, 181 S.E. 271.

All of these things may require an abutting owner to travel a greater distance to get to his destination. The law applicable to such changes and regulations was stated in Sanders v. Smithfield, 221 N.C. 166, 19 S.E. 2d 630. It is there said:

> "It is generally held that the owner of abutting property has a right in the street beyond that which is enjoyed by the general public, or by himself as a member of the public, and different in kind, since egress from and ingress to his own property is a necessity peculiar to himself . . .
>
> "Where there is no actual encroachment on the property, but only the question of interference with the appurtenant easement, since the right itself springs out of and attaches to the use of a public facility, conservative opinion tends strongly to limit it to such reasonable recognition as will meet the exigencies involved in the owner's use of his property, and yet will not unduly restrict the government in functioning for the public convenience and necessity.
>
> "It is understood that absolute equality of convenience cannot be achieved, and those who take up their residence or purchase and occupy property in proximity to public roads or streets do so with notice that they may be changed as demanded by the public interest. To justify recovery in such case, the damages must be direct, substantial and proximate, and not such as are attributable to mere inconvenience—such as being compelled to use a longer and more circuitous route in reaching the premises. McQuillan, op. cit., supra, Section 1527 (1410). It is not enough that the vacation results in some inconvenience to his access, or compels a more circuitous route of access, or a diversion of traffic from the premises, or a consequent diminution in value. 18 Am. Jur., Eminent Domain, sec. 225. An inconvenience of that nature is held to be no different in kind, but merely in degree, from that sustained by the general public, and is damnum absque injuria."

The basic principle that an abutting property owner is not entitled to compensation because of circuity of travel resulting from a limitation on the direction in which traffic may move, was reiterated in the thoughtful opinion of Bobbitt, J., in Barnes v. Highway Commission, 257 N.C. 507, 126 S.E. 2d 732. Reference is made to the opinion for the numerous cases cited to support the conclusion there reached.

Petitioners' contention that they are entitled to compensation because of the decreased number of travelers who use that portion of the highway affording direct access to their property is likewise without merit. If petitioners could collect because of such diminution in travel by their property, so could every merchant in a town when the Highway Commission constructed a by-pass to expedite the flow of traffic. The true rule with respect to such relocation or change in construction was, we think, aptly stated by the Supreme Court of Vermont in Nelson v. State Highway Board, 1 A 2d 689, 118 A.L.R. 915. The Court there said:

> "(T)he State owes no duty to the Nelsons (property owners) in regard to sending public travel past their door. Our truck line highways are built and maintained to meet public necessity and convenience in travel and not for the enhancement of property of occasional landowners along the route. Benefits which come and go with changing currents of public travel are not matters in which any individual has any vested right against the judgment of those public officials whose duty it is to build and maintain these highways."

The revamping of our highway system, making it useful if needed for both national defense and as a safe and economical means of rapid interstate travel, has created many problems for the property owner as well as the agencies charged with the responsibility of constructing and maintaining that system. Naturally these problems have produced much litigation.

An examination of these cases and of treatises by members of the Bar who have made a particular study of the problem will, we think, show the decided weight of opinion supports the conclusion we reach; i.e., an abutting property owner is not entitled to compensation because of the construction of a highway with different lanes for different kinds and directions of traffic, if he be afforded direct access by local traffic lanes to points designated for access to through traffic. See Abdalla v. Highway Commission, 261 N.C. 114, 134 S.E. 2d 81; State v. Danfelser, 384, P, 2d 241; Stefan Auto Body v. State Highway Commission, 124 N.W. 2d 319; Nick v. State Highway Commission, 109 N.W. 2d 71; Arkansas State Highway Commission v. Bingham, 333 S.W. 2d 728; Covey: Control of Highway Access, 38 Neb. L. Rev., 407; Anderson: Control of Access by Frontage Roads—Police Power or Eminent Domain?, 11 Kan. L. Rev., 388; Covey: Frontage Roads: to Compensate or not to Compensate, 56 N.W.U.L. Rev.587; Levin: Federal Aspects of the Interstate Highway Program, 38 Neb. L. Rev. 377.

Because of the public importance of the question presented, we have treated the subject without regard to the provisions contained in the deed granting petitioners an easement. This deed was executed subsequent to the enactment of Chapter 993, S.L. 1957, (Art. 6D c. 136 of the General Statutes). In examining it we are led to the conclusion that both petitioners and their grantors understood the law to be as we have here declared. The easement then granted was to continue only "until such time as the said land shall be conveyed to or taken by the State Highway and Public Works Commission for highway purposes with adequate access allowed to second parties for the operation of their motel and restaurant business." It is further provided in the deed, "In case said land is taken by condemnation, first parties shall be entitled to and hereby reserve for themselves, their heirs and assigns, the right to the entire award for damages resulting from such condemnation, except damages, if any, for severence from said 3.7 acres of land in case adequate access is not available to the second parties, their heirs and assigns, and in such event,

the said second parties shall be entitled to severence damages for loss of adequate access to said highway." What highway were the parties talking about? Certainly they were not talking about 301 as it existed at the time of conveyance. The recitals in the deed show that they anticipated the enlargement of the highway in the immediate future. Petitioners do not contend that they do not have direct and immediate access to the new highway. That access is provided by the service roads. These service roads are part of the highway system. They serve not only the petitioners but any member of the public who desires to use the same. These service roads connect with fixed points by which the traveler may enter the north or southbound through stream of traffic.

Since petitioners have not suffered a compensable injury, the order appointing commissioners to ascertain the amount of compensation owing petitioners must be and is

Reversed.

SUPREME COURT OF NORTH CAROLINA
ADRIAN J. NEWTON, CLERK
P. O. BOX 2170
RALEIGH

MRS. SARAH B. HANNER
MRS. FREEDA D. WATKINS
DEPUTY CLERKS

11 June 1964

Messrs. Morgan and Williams
Attorneys at Law
P. O. Box 966
Lillington, North Carolina

Re: Moses v Highway Comm.
No. 596, Spring Term 1964

Gentlemen:

Petition to rehear in the above entitled case is filed with the following order:

> "Examined and denied, this 11 June 1964. R. Hunt Parker, Associate Justice and Carlisle W. Higgins, Associate Justice."

Sincerely yours,

ADRIAN J. NEWTON
Clerk of the Supreme Court

AJN:cjd

cc Mr. Archie Taylor
Attorney General
Quillin, Russ & Worth

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 16 1964
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 490

JOSEPH E. MOSES and wife, JOSEPHINE E. MOSES,

Petitioners

vs.

NORTH CAROLINA STATE HIGHWAY COMMISSION,

Respondent.

BRIEF OF RESPONDENT, NORTH CAROLINA STATE HIGHWAY COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, NORTH CAROLINA STATE HIGHWAY COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

This civil action was decided by the Supreme Court of North Carolina at its Spring Term, 1964, and is reported as Moses vs. Highway Comm., 261 N.C. 316, 134 S.E. 2d 664. The opinion of the Supreme Court of North Carolina appears also in Appendix A, Petitioners' Petition, pp. 16-23.

Petitioners' motion to rehear in the North Carolina Supreme Court pursuant to Rule 44 of the Rules of Procedure in the Supreme Court of North Carolina, was "examined and denied this 11 June 1964." The notification of the same appears in Appendix A, Petitioners' Petition, p. 24.

JURISDICTION

Objection is hereby made to the jurisdiction of this Court to grant a writ of certiorari in this action.

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. 1257 (3) pertaining to writs of certiorari. No where in the Record does it appear, affirmatively or otherwise, that a Federal question was presented in the lower court or the highest court of North Carolina. Nor does it appear that the North Carolina Supreme Court had to make a decision on a Federal question in determination of this cause. Durley vs. Mayo, 351 U.S. 277, 76 S. Ct. 806.

Petitioners, in their Brief filed with the Supreme Court of North Carolina, asserted the guaranties provided for by Article I, Sec. 17, of the North Carolina Constitution and cases interpreting the same, and made mention of the Fifth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution applies only to the Federal Government and not the States. Brown v. New Jersey, 175 U.S. 172; Simmons v. South Carolina State Highway Dept., 195 F. Supp. 516; Williams v. State Highway Comm. 252 N.C. 141, 113 S.E. 2d 263.

North Carolina has long recognized and followed the principles of paying just compensation for properties taken under sovereign authority.

> "Our Constitution, Article I, Sec. 17, guarantees payment of compensation for property taken by sovereign authority . . . a constitutional prohibition against taking or damaging private property for public use without just compensation is self executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such

grievance." Midgette v. Highway Comm., 260 N.C. 241, 132 S.E. 2d 599.

Petitioners, in their Petition for Writ of Certiorari, attempt to raise a Federal question, for the first time, by citing the Fourteenth Amendment to the United States Constitution. As stated above, the question was not specifically raised, intimated, or presented, and, even if properly raised, the judgment of the North Carolina Supreme Court rests on adequate independent State grounds with no substantial Federal question existing or required to be passed on by the North Carolina Court in determination of this cause.

QUESTION PRESENTED

Whether an abutting property owner is entitled to compensation because of the construction of a highway with different lanes for different kinds and directions of traffic, if he be afforded direct access by local traffic lanes to points for access to the through lanes.

STATEMENT OF THE CASE

The opinion of the North Carolina Supreme Court held that the Highway Commission had not taken any property rights of the Petitioners and the Petitioners had not suffered a compensable injury (Appendix A, Petitioners' Petition, p. 23). Under Article I, Sec. 17 of the North Carolina Constitution, compensation must be paid where there is a taking of property. In this action, there was no taking of physical property or property rights, but merely the substitution of a service or frontage road for the previously existing access to U. S. Highway 301. This was accomplished through the Highway Commission's exercising its police powers to regulate the direction flow and diversion of traffic for the protection, safety, and welfare of the traveling public and, more specifically, those entering and leaving the through lanes of travel.

ARGUMENT

Petitioners concede in their Brief that "the weight of authority holds that a property owner has no vested interest in the continued flow of the main stream of through traffic" (Petitioners' Petition, p. 8). Nevertheless, they contend that the substitution of a service road or the designation of an existing road into through lanes and outer lanes for the service roads amounts to a taking of their property abutting said outer lanes.

Each Court decision passing on this problem, and those cited by the Petitioners, must be read carefully as to the facts and the reasoning of the courts to distinguish when the substitution of a frontage road for access is compensable and when it is not. Covey, Frontage Roads: To Compensate or Not to Compensate, 56 Northwestern University Law Review 587, is relied on heavily in the Petition by the Petitioners and was relied on by the Respondent in its Brief and argument to the North Carolina Supreme Court. Mr. Covey's article and other text writers were cited and their conclusions followed in the opinion of the North Carolina Supreme Court. (Appendix A, Petitioners' Petition, p. 22).

It is again important to note that no physical property was appropriated from the Petitioners. Access was simply controlled by the building of a service lane as part of the overall highway which permitted immediate access, via interchange, to the adjacent inter lanes designated for through traffic. Many of the cases cited by the Petitioners in their Petition (pp. 9-10) as permitting recovery involves situations where there was a corollary "taking of land." In *People v. Ricciardi*, 23 Cal. 2d 390, 144 P. 2d 799, cited by Petitioners, the statement was made that the abutter's right of access was a "vested right in a specific traffic avenue carrying a particular burden of traffic." This is certainly not sound reasoning in the light of the conceded weight of authority being to the effect that a property owner has no vested interest in the continued flow of the main stream of through

traffic. The holding in *People v. Ricciardi*, supra, has been criticized in articles entitled Freeways and Rights of Abutting Owners, 3 Stanford Law Review (1951), 298, 306, and Clark, The Limited Access Highway, 27 Wash. Law Review (1948) 111, 125.

This Court most recently (March 30, 1964) denied a petition for writ of certiorari in *Nick v. State Highway Comm. of Wisconsin*, 21 Wis. 2d 489, 124 N.W. 2d 574, petition denied March 30, 1964 in 84 S. Ct. 1125. In the original State Court opinion of *Nick v. Wis.*, 13 Wis., 2d 511, 109 N.W. 2d 71, the Wisconsin Supreme Court followed the reasoning in *Carazalla v. State*, 269 Wis. 593, 608b, 70 N.W. 2d 208, 71 N.W. 2d 276 and said:

> "We approved the conclusion of textwriters that if no land is taken for the converted highway but the abutting landowner's access to the highway is merely more circuitous, no compensation should be paid, and our decisions embodied that principle."

Certiorari to this Court was sought by Mrs. Nick on a subsequent administrative denial of a driveway permit when she had access from her property to Highway 30 by means of Calhoun Road.

CONCLUSION

Sound reasoning indicates that where unregulated access and the intermixing of through taffic and local traffic are permitted, highway effectiveness or efficiency declines and, as a consequence, roadside businesses, depending on such traffic, deteriorate. Where police powers are properly exercised for the benefit of the public and traffic is separated and channelized within the existing right of way, it would appear to facilitate rather than retard the development of properties and maintain longer the value of these abutting properties.

This case is not a question of a taking of property without payment of just compensation. It is a question of the exercise of the police powers of the State of North Carolina, through its agency, the State Highway Commission, for the promotion of public safety and welfare. A prohibition simply upon the lanes of travel an abutting property owner must use, along with other members of the public, cannot, in any just sense, be deemed a taking or an appropriation for the public benefit. Barnes vs. Highway Comm., 257 N.C. 507, 126 S.E. 2d 732; Snow vs. Highway Comm., 262 N.C. 169, 136 S.E. 2d 678; Abdalla vs. Highway Comm., 261 N.C. 114, 134 S.E. 2d 81; Goldblatt vs. Town of Hempstead, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987.

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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